

STATE OF MICHIGAN
COURT OF APPEALS

RITA L. ALTON,

Plaintiff-Appellant,

v

LARRY G. ALTON,

Defendant-Appellee.

UNPUBLISHED

June 15, 2006

No. 263743

Genesee Circuit Court

LC No. 04-079690-NZ

Before: Sawyer, P.J., and Wilder and H. Hood*, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendant summary disposition pursuant to MCR 2.116(C)(7), on the basis that plaintiff's claims for breach of contract, innocent misrepresentation, and constructive trust were barred by res judicata. We affirm.

Plaintiff and defendant engaged in cohabitation without the benefit of marriage from 1991 until October 1999, when they married. Plaintiff asserts that, during the time they lived together before marriage, she contributed to defendant's separate assets, including his medical practice, the realty on which the medical practice was located, the home where the parties lived, and a hotel in which defendant owned shares. Plaintiff also claims that she performed household services for defendant and contributed to the household by using support payments made by her former husband. Plaintiff claimed that, early in her relationship with defendant, he promised to take care of her financially for the rest of her life and to share ownership of his assets with her. Defendant wrote a letter to plaintiff's mother indicating that he would spend the rest of his life caring for plaintiff and being good to her.

In October 2003, defendant filed for divorce from plaintiff. Plaintiff answered the divorce complaint and filed a counterclaim, alleging breach of contract, constructive trust, fraudulent misrepresentation, and "other" misrepresentation. Her allegations were based on her claims that defendant had promised to provide for her financially for her lifetime and to share ownership of his separate assets. Defendant objected to the counterclaim, and the divorce court severed the counterclaim from the divorce action. Plaintiff subsequently filed this separate civil action alleging breach of contract, fraudulent misrepresentation, "other" misrepresentation, and constructive trust.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

While this action was pending, the divorce trial occurred. During that trial, plaintiff pursued her “affirmative matter” that, like her separate claims in this civil action, were based on defendant’s promise to financially provide for her and to share ownership of assets. Over defendant’s objection, plaintiff offered testimony about events and contributions made to the parties’ household and defendant’s assets before the marriage. Plaintiff argued that the divorce court needed to consider the parties’ past relationship and conduct when determining the issues before it. Plaintiff also requested permanent lifetime spousal support and an equal or greater portion of all assets, including defendant’s separate assets. The divorce court awarded plaintiff spousal support¹ and explicitly determined that plaintiff was not entitled to permanent spousal support. The divorce court also awarded plaintiff a share of some of the assets, including a share of the home and defendant’s medical practice.

After the divorce court issued its findings of fact, conclusions of law, and absolute judgment of divorce, defendant moved to amend his affirmative defenses in this case to include res judicata and collateral estoppel. He also moved for summary disposition pursuant to MCR 2.116(C)(7), arguing in part that plaintiff was precluded by res judicata from litigating her claims. Defendant alleged that the amount of support and property to which plaintiff was entitled was decided in a final, binding judgment issued by the divorce court. The trial court agreed and granted defendant’s motion for summary disposition.

On appeal, plaintiff first argues that res judicata should not have been applied to bar her claims in this separate case. Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by res judicata. We review de novo a trial court’s decision on a motion for summary disposition pursuant to MCR 2.116(C)(7). *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). We also review de novo the issue whether res judicata bars a subsequent action. *Id.*

Res judicata “bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.” *Adair, supra* at 121. Courts have adopted a broad approach to res judicata, holding that it bars “every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Id.* at 123. In deciding whether the facts pertinent to both actions constitute a transaction for purposes of res judicata, this Court considers whether the facts are related in time, space, origin, or motivation, and whether they form a convenient trial unit. *Id.* at 125.

In this case, the divorce action was decided on the merits, and the judgment was a final judgment. Further, the same parties were involved in the divorce action and this present action.

¹ Specifically, the divorce court awarded plaintiff \$950 a week, or \$49,590 a year, for 18 months and reserved discretion to expand up to 48 months if she enrolled in school. Defendant also paid plaintiff support during the 17-month duration of the divorce proceedings. We note that plaintiff’s previous spousal support was a lifetime award of \$400 a week, or \$20,800 a year, from her previous husband, and plaintiff received a lump sum payment of \$27,900 from her previous husband when her weekly spousal support from him was terminated.

The only remaining issue is whether the contested “matters” in this case were or could have been resolved in the divorce action. We conclude that the contested matters in this case were previously resolved in the divorce action.

In the context of the divorce action, plaintiff filed a counterclaim, alleging breach of contract, misrepresentation, and constructive trust claims. It is undisputed that defendant objected to those claims being raised in the divorce case, and that the divorce court severed those claims from the divorce case. It is also undisputed that plaintiff subsequently filed the aforementioned claims in this action. The claims were based on defendant’s alleged promises to provide for plaintiff’s material needs and share property. While plaintiff refiled her counterclaim as a separate action, her answer and “affirmative matter” remained before the divorce court. The same allegations on which she based her contract, misrepresentation, and constructive trust claims in this case were included in her answer and “affirmative matter” and continued before the divorce court.

During the divorce trial, over defendant’s objection, plaintiff raised and argued issues related to the premarital relationship, her contributions to defendant’s assets, defendant’s contributions, and the letter written by defendant to plaintiff’s mother, wherein defendant stated that he would spend his life caring for plaintiff. Plaintiff also testified that defendant promised her that he would always take care of her financially. In awarding spousal support and dividing the parties’ property, plaintiff asked the trial court to consider not only the marriage, but also the past relationship and conduct of the parties. Her counsel requested permanent, lifetime spousal support. By doing so, he explicitly sought relief on plaintiff’s claim that she was entitled to permanent financial support. Plaintiff’s counsel also asked for a share in all the assets, and argued about plaintiff’s premarriage contributions to defendant’s separate assets. The divorce court heard the arguments and decided the issues of spousal support and plaintiff’s entitlement to property.

In this case, regardless of the labels attached to plaintiff’s claims, identical evidence and facts, including evidence about defendant’s promises, the value of assets, and plaintiff’s entitlement to property and lifetime financial support, are involved. The same “matters” contested in this case were resolved in the divorce case, specifically the amount of support and portion of property to which plaintiff was entitled. Plaintiff’s claims in this case were resolved in the divorce case. *Adair, supra* at 121. We conclude that summary disposition pursuant to MCR 2.116(C)(7) was appropriate on the ground that res judicata barred plaintiff’s claims.

We disagree with plaintiff’s argument that it is patently unfair for defendant to rely on the doctrine of res judicata where he requested and argued that the divorce court should sever her separate claims from the divorce trial. Any merit this argument may have had is negated by the fact that, during the divorce trial, defense counsel objected on several occasions to plaintiff’s injection of evidence and facts relating to the period before the parties married.² In responding

² For example, during plaintiff’s direct examination, when plaintiff offered copies of canceled checks that were written before the parties married, defendant objected, in part, on relevance grounds. Defendant objected again during plaintiff’s direct examination when plaintiff offered copies of deposit slips from before the marriage.

to those objections, plaintiff's counsel insisted that the facts of the parties' premarital relationship were relevant and needed to be placed before the divorce court to enable an appropriate property division. The divorce court allowed plaintiff to pursue her inquiries. While we are mindful that the divorce court properly severed plaintiff's breach of contract, misrepresentation, and constructive trust counterclaim, we are not persuaded that the labels chosen by plaintiff to frame her claims affect our res judicata analysis in this case.

Plaintiff next argues that collateral estoppel should bar defendant from relitigating issues decided by the divorce court, but that the doctrine should not be applied to her. We deem this issue abandoned by plaintiff's failure to explain or rationalize her positions and failure to cite relevant and applicable authority to support those positions. An appellant may not merely announce her positions and leave it to this Court to discover and rationalize the basis for those positions, nor may she give only cursory treatment with little or no citation of authority. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Moreover, in light of our decision affirming the trial court's grant of summary disposition in favor of defendant based on res judicata, it is unnecessary to consider this issue.

Plaintiff next argues that her original count of fraudulent misrepresentation should not have been dismissed pursuant to MCR 2.116(C)(8). A motion pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the pleadings alone, and the motion may not, therefore, be supported with documentary evidence. "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Adair, supra* at 119, quoting *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion pursuant to MCR 2.116(C)(8) should be granted only when the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Adair, supra* at 119, quoting *Maiden, supra* at 119.

In order to establish a prima facie case of fraudulent misrepresentation, a plaintiff must prove that a defendant made a material representation; that it was false; that, at the time it was made, the defendant knew it was false or made it recklessly with disregard of its truth or falsity; that the defendant intended the plaintiff to act on the representation; and that the plaintiff suffered damage. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 378; 689 NW2d 145 (2004). Generally, a fraud claim cannot be based on a promise of future conduct. *Derderian, supra* at 378, citing *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). An exception exists, however, where a promise is made in bad faith without the intention to perform it. *Derderian, supra* at 378. "[E]vidence of fraudulent intent, to come within the exception, must relate to conduct of the actor 'at the very time of making the representations, or almost immediately thereafter.'" *Id.* at 379, quoting *Hi-Way Motor Co, supra* at 338-339. The plaintiff must demonstrate that, at the time the defendant made the alleged promises, he did not intend to fulfill them. *Derderian, supra* at 378.

In this case, plaintiff did not plead that, at the time defendant made his alleged promises to her, he had no intention of keeping them. She pleaded a claim of fraudulent misrepresentation based on mere promises of future conduct, specifically defendant's promises to financially care for her and provide an ownership interest in his assets. Because plaintiff did not plead the exception, the trial court properly granted summary disposition on the fraudulent misrepresentation claim pursuant to MCR 2.116(C)(8).

Plaintiff also argues that the trial court erred in permitting defendant to amend his affirmative defenses to include res judicata and collateral estoppel. She argues that the amendment was untimely and that it was futile because res judicata does not apply to this case. We review the trial court's decision on a motion to amend for an abuse of discretion. *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 5; 687 NW2d 309 (2004).

Leave to amend should be freely granted when justice so requires. MCR 2.118(A)(2). However, leave to amend should not be granted in the face of undue delay, bad faith, or dilatory motive on the part of the movant, or undue prejudice to the opposing party by virtue of allowance of the amendment. [*Id.* at 5.]

In this case, there was no undue delay, bad faith, or dilatory motive on the part of defendant in amending his affirmative defenses. The defenses of res judicata and collateral estoppel were inapplicable until shortly before defendant sought leave to amend. They became applicable only after the divorce court issued its findings of fact, conclusions of law, and absolute judgment of divorce. The motion to amend was not untimely. Additionally, no unfair prejudice resulted from the amendment. "The mere fact that an amendment might cause a party to lose on the merits is not sufficient to establish prejudice." *Id.* Further, we disagree with plaintiff's argument that the amendment of the affirmative defenses was futile. An amendment is futile where, "*ignoring the substantive merits of the claim*," it is legally insufficient. *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991). Here, regardless of the merits of the defenses of res judicata and collateral estoppel, they are legally sufficient affirmative defenses. Indeed, we have concluded that the defense of res judicata is actually meritorious. Accordingly, the trial court did not abuse its discretion in permitting defendant to amend his affirmative defenses.

Plaintiff next argues that, because the trial court denied defendant's first motion for summary disposition pursuant to MCR 2.116(C)(7), the second motion brought under that subrule was barred as a matter of law. This issue is not only unpreserved, but we deem it abandoned. *Wilson, supra* at 243. In any event, the issue is without merit. The first motion pursued by defendant under MCR 2.116(C)(7) was based on the applicable statutes of limitation. The second motion was based on the different grounds of res judicata and collateral estoppel. The first order denying summary disposition under MCR 2.116(C)(7) did not bar defendant from pursuing a subsequent motion on different grounds under the same subrule.

Finally, plaintiff identifies a "catchall" issue, stating that defendant's "remaining arguments" are without merit. Plaintiff fails to develop her issue. She does not specify the nature of the "remaining arguments," the context in which those arguments were made, or the significance of those arguments in relation to this appeal and the relief she is seeking by way of this appeal. Additionally, she provides cursory treatment to the issue and fails to cite relevant authority to enable this Court to make a decision. The issue is abandoned. *Wilson, supra* at 243.

Affirmed.

/s/ David H. Sawyer
/s/ Harold Hood